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No. 82-1002

IN THE

Supreme Court of the United States

October Term, 1982

CARNATION COMPANY,

Petitioner,

v.

STATE DIVISION OF HUMAN RIGHTS, on the complaint of DARYL CLARKE,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of the State of New York, Appellate Division, Fourth Department

BRIEF FOR RESPONDENT STATE DIVISION OF HUMAN RIGHTS IN OPPOSITION

ANN THACHER ANDERSON
General Counsel
State Division of Human Rights
Attorney for Respondent
State Division of Human Rights
2 World Trade Center
New York, New York 10047
(212) 488-5376

SARA TOLL EAST
Of Counsel

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BRIEF FOR RESPONDENT STATE DIVISION OF HUMAN RIGHTS IN OPPOSITION

Respondent State Division of Human Rights respectfully requests that the petition for a writ of certiorari be denied because:

(1) The Court lacks jurisdiction.

(2) The petition raises no substantial federal question.

Statement of the Case

Petitioner seeks review by this Court of the decision of the Appellate Division of the Supreme Court of the State of New York which confirmed and enforced an order of the State Human Rights Appeal Board affirming an order of the State Division of Human Rights.

The administrative orders sustained by the Appellate Division found that petitioner had violated the Human Rights Law, Executive Law § 296.10 (McKinney 1982), by demoting complainant Daryl Clarke, a Seventh-day Adventist, to a lower paying job because he would not work on his Sabbath.*

At the Division's hearing, petitioner did not submit any cost data to support its position that accommodating complainant in his former position would have resulted in a significant increase in cost. The Division found that petitioner had failed to demonstrate undue economic hardship, as required by Section 296.10(c) of the Human Rights Law. The Appellate Division found on a review of the entire record, that it supported the Division's order. *State Division of Human Rights* v. *Carnation Co.*, 86 A.D.2d 977 (4th Dept. 1982).

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* The Court of Appeals on a previous appeal had remanded the matter to the Division for a hearing to determine whether retaining complainant in his former position and permitting him to observe his Sabbath would have resulted in undue economic hardship. *State Div. of Human Rights* v. *Carnation Co.*, 42 N.Y.2d 873 (1977).

At the Appellate Division, petitioner did not challenge the constitutionality of the Human Rights Law and did not raise any federal questions.*

After the Appellate Division affirmed the Division's order, petitioner sought and was denied leave to appeal to the Court of Appeals pursuant to N.Y. Civ. Prac. Law § 5602(a). *State Division of Human Rights* v. *Carnation Co.*, 57 N.Y.2d 606 (1982). In its motion for such leave, petitioner did not challenge the validity under the Federal Constitution of the Human Rights Law and did not raise any federal questions.**

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* The questions raised and briefed by petitioner at the Appellate Division were:

> Question 1: Has the Respondent made reasonable effort within the meaning of section 296.10(a) of the Executive Law to accommodate the Complainant in the practice of his religion?
>
> Question 2: Are the Orders of the Commissioner of the State Division of Human Rights and the State Human Rights Appeal Board supported by substantial evidence?
>
> Question 3: Are the legal premises relied upon by the Commissioner at variance with the law which is applicable to the issues raised at the hearing as set forth by the New York Court of Appeals in *State Division of Human Rights* v. *Carnation Co.*, 42 N.Y.2d 873 (1977), and in further contradiction of the decision of this Court previously issued relative to the matters herein in *State Division of Human Rights* v. *Carnation Co.*, 53 A.D.2d 1053 (4th Dept. 1976)?
>
> Question 4: Has the inordinate administrative delay in processing the complaint and prosecuting the appeal herein in violation of the time limitation set forth in Section 297(2), (4)(a) and(c) and 297-a(4) of the Executive Law substantially prejudiced Respondent as a matter of law thereby divesting the Division and the Appeal Board of jurisdiction to issue the Orders herein?

Petitioner's Appellate Division brief at 1-2.

** The questions presented by petitioner at the Court of Appeals in its brief in support of its motion were:

> *Question I:* Does section 296.10(c) of the Executive Law require an employer to make a good faith effort to accommodate the religious beliefs of a sabbath observer?

(footnote continued on next page)

Petitioner did not invoke N.Y. Civ. Prac. Law § 5601 (b)(1), which provides an appeal as of right where there is directly involved the construction of the Constitution of the United States.

Reasons Why the Writ Should Be Denied

I

The Court Lacks Jurisdiction in This Case

1. The federal constitutional questions raised in the petition were not properly raised, preserved or passed upon in the state courts below.

Petitioner failed to draw into question below the validity of the Human Rights Law on the grounds of repugnance to the Constitution or laws of the United States. Because of this failure, the state courts did not pass upon federal questions.

Question II: Does section 296.10(c) of the Executive Law permit the employer to show undue economic hardship by "a palpable increase in costs or risk to industrial peace"?

Question III: Did the Appellate Division, Fourth Department, misconstrue the mandate of this Court in *State Division of Human Rights* v. *Carnation Co., supra,* when it limited Carnation's review to the issue of increased costs?

Question IV: Was there sufficient evidence in the record to establish discrimination as a matter of law?

Question V: Did the Court below err in requiring that the complainant be reinstated to his former position?

Question VI: Should the Division be divested of jurisdiction for egregious administrative delay in the implementation of the Human Rights Law where the delays far surpass the unusual situation presented in *Board of Education of West Valley* v. *State Division of Human Rights,* 42 N.Y.2d 862 (1977)?

Petitioner's Court of Appeals brief at 2-6.

Petitioner's reference in its Court of Appeals brief to "due process of law"* did not properly raise or preserve a federal question. Petitioner did not cite the Federal Constitution; Article 1 § 6 of the New York State Constitution contains virtually identical due process language. See *Webb* v. *Webb*, 451 U.S. 493 (1981).

Therefore this Court is without jurisdiction in this case. *Cardinale* v. *Louisiana*, 394 U.S. 437 (1969); *Wilson* v. *Aiken Industries, Inc.*, 439 U.S. 877 (1978).

2. The Appellate Division was not the highest court in which a decision could be had within the meaning of 28 U.S.C. § 1257(3).

Petitioner failed to invoke N.Y. Civ. Prac. Law § 5601 (b)(1), which provides an appeal as of right to the Court of Appeals where there is directly involved the construction of the Constitution of the United States.**

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* It is also important to note that for the Court of Appeals to confine Carnation to a hearing devoted to this one issue would have been a denial of due process of law. Under the due process clause, a court cannot deprive a party of a full evidentiary hearing on all of the issues raised by a statute. *Bell* v. *Burson*, 402 U.S. 535 (1971); *Goldberg* v. *Kelly*, 397 U.S. 254 (1970); *Sniadach* v. *Family Finance Co.*, 395 U.S. 337 (1969). By confining the hearing which Carnation received to the issues of increased cost and industrial peace, as the appellate court's mistaken interpretation of the Court of Appeals' decision has done, the decision below has deprived Carnation of due process of law and rendered this statute unconstitutional as applied.

Petitioner's brief at 21-22.

** In addition, by explicitly acknowledging that the Appellate Division's decision was "not appealable as of right under CPLR § 5601" petitioner conceded that no constitutional issue was involved. Petitioner's Court of Appeals brief at 2.

By failing to invoke the mandatory jurisdiction of the Court of Appeals, petitioner failed to exhaust all the possibilities afforded by state procedure for review. See *Gorman* v. *Washington University*, 316 U.S. 98 (1942). The petition therefore must be denied. See *Southern Electric Co.* v. *Stoddard*, 269 U.S. 186 (1925); *North Shore University Hospital* v. *State Human Rights Appeal Board*, —— U.S. ——, 103 S. Ct. 355 (1982).

II

The Petition Raises No Substantial Federal Question

The petition raises four questions. None is an important question of federal law.

First Question: Can the State of New York require more than reasonable accommodation under Section 296.10(c) of the Executive Law?

This is not a federal question. The Court is bound to accept the construction of New York law by the New York Courts. See *Kingsley International Pictures Corp.* v. *Regents of University of New York*, 360 U.S. 684, 688 (1959); *Hortonville Joint School District No. 1* v. *Hortonville Education Ass'n*, 426 U.S. 482, 488 (1976).

Second Question: If more than reasonable accommodation is required, does such requirement violate the Establishment Clause of the First Amendment?

This question is without merit because the Human Rights Law has not been construed to require more than reasonable accommodation.

Third Question: Does the First Amendment require a uniform national standard for questions of religious discrimination?

The First Amendment does not provide a basis for striking down the provisions in the Civil Rights Act of 1964 which expressly preserve state anti-discrimination laws and disclaim any intent to pre-empt or exclude them. 42 U.S.C. §§ 2000e-5(b-e), 2000e-7, 2000h-4. See *Kremer* v. *Chemical Construction Corp.*, —— U.S. ——, 72 L.Ed. 2d 262, 275-277 (1982).

Fourth Question: Does federal law pre-empt a state from compelling compliance with a Sabbath observer provision in a manner inconsistent with a collective bargaining agreement?

There can be no determination of this question because there is no evidence that by accommodating complainant the collective bargaining agreement would be violated. Seniority, an issue in *Trans World Airlines* v. *Hardison*, 432 U.S. 63 (1977), was not a factor and not an issue in this case (Petitioner's Appendix C at 54, Finding of Fact 15).

The only grievance under the collective bargaining agreement pending at the time of the hearing* was the grievance filed by complainant charging that by refusing to accommodate him, petitioner had violated the non-

* An earlier grievance filed by an employee objecting to filling in for complainant on Saturdays had been voluntarily settled by petitioner in the grievant's favor without resort to arbitration (Transcript at 187-189).

discrimination clause of the contract (Transcript at 143, Respondent's Exhibit F).

Fifth Question: Does the substantial evidence test in Section 298 deny petitioner due process of law?

The Division was acting in a judicial capacity when it resolved issues of fact properly before it upon remand from the Court of Appeals. Petitioner had a full and fair opportunity to argue its version of the facts. The administrative nature of the fact finding did not deprive petitioner of due process of law. *United States* v. *Utah Construction & Mining Co.*, 384 U.S. 394, 422 (1966).

The Human Rights Law provides for both administrative and judicial review. N.Y. Exec. Law §§ 297-a, 298. This "panoply of procedures" has been characterized by this Court as sufficient under the Due Process Clause. *Kremer* v. *Chemical Construction Corp.*, —— U.S. ——, 72 L.Ed.2d 262, 282 (1982).

Conclusion

The petition for a writ of certiorari should be denied.

Respectfully submitted,

ANN THACHER ANDERSON
General Counsel
State Division of Human Rights
Attorney for Respondent
State Division of Human Rights
2 World Trade Center
New York, New York 10047
(212) 488-5376

SARA TOLL EAST
Of Counsel